KEEPING AN OPEN MIND: THE IMPORTANCE OF INFORMED PUBLIC DEBATE ABOUT SENTENCING

Address by Justice Chris Maxwell, President, Court of Appeal, Supreme Court of Victoria, to ICJ Victoria Sentencing Forum 7 December 2011

Public debate on sentencing is vitally important. Issues of criminal responsibility and punishment are, quite properly, matters of great community concern. It is a foundational principle of our democracy that we as judges are accountable to the community for the decisions we make.

Public accountability is, of course, why we give such detailed reasons for our sentencing decisions. Any one who has had the opportunity to listen to a judge giving reasons for sentence – or to read a full set of reasons – will know what I mean.

Many of you will recall the sentencing earlier this year of Arthur Freeman, who was convicted of murdering his daughter by throwing her off the Westgate Bridge. He was sentenced by Coghlan J, the head of the Criminal Division of the Supreme Court. As routinely happens in the Supreme Court these days, an audio recording of the sentence was made available as the sentence was being delivered.

Unusually, two of Melbourne's radio stations played the audio recording in full on their morning programs. The feedback was quite remarkable. It became apparent that hearing Coghlan J explain, in detail, all of the various considerations which he had had to weigh in the balance gave many people an insight into sentencing which they had never previously had. Numbers of talkback callers made comments to the effect of "I had no idea that sentencing was such a difficult and complicated process. I understand the process much better now."

The point is a simple one. The closer you get to the sentencing process, and the more you understand about it, the better placed you are to make a judgment about it. Of course, you may still disagree with what the judge has done. But, once you understand the full picture, you have a much better idea of how the judge arrived at the result than if you only read the bare details of the offence and the sentence imposed.

In six and a half years in the Court of Appeal, I have seen sentencing pretty close up. In that time, I have been involved in deciding literally hundreds of appeals against sentence. For each case, we read the arguments which were advanced before the sentencing judge. We see the exchanges which take place, between the sentencing judge and the prosecutor and the defence, as the judge strives to get a clear picture of the offending and of the victim and of the offender. And we read the reasons for sentence.

Sentencing is a painstaking, gut-wrenching process. As Chief Justice Warren has said, sentencing haunts judges:

> *"We all remember each person sentenced and the faces of the families pleading for mercy on one side and those on the other side pleading for due punishment."*

There is no "right" answer in any given case. Views will differ about what the appropriate sentence was; about how the balance was to be struck between the competing considerations. But sentencing judges strive, every day and in every court, to do their best to arrive at a just answer. And they do so, not with any sense of detachment from, or superiority over, the rest of the community, but with an acute sense that they are members of the community and that what they do is done on behalf of that community.

In a proportion of cases, the Court of Appeal decides that the sentencing judge was wrong. Sometimes we conclude that the sentence was too heavy and we reduce it; on other occasions, on an appeal by the Director of Public Prosecutions, we conclude that it was too lenient, and we increase it. It is a process of intensive scrutiny and quality control, and one which should give the Victorian community great confidence.

If we think that sentences for a particular offence are generally too low, we say so – as the Court did, for example, in relation to "glassing", where serious injury is caused to a victim by being hit in the face with a glass or a bottle.[1] Now, as Whelan J said when imposing sentence in a subsequent case,[2] "glassing means jail".

One of the disadvantages of the focus on sentencing in public debate is that not enough attention is paid to the core work of the criminal justice system, which is the investigation and prosecution of serious crime, and the conduct of fair trials. Perhaps because we largely take it for granted, we forget that fair trials and just convictions are the foundation of community confidence in a system of criminal justice.

I have sat on a large number of conviction appeals, and I can tell you that the work done by trial judges – and juries – in the County Court and the Supreme Court is outstanding. Of course, some conviction appeals do succeed but the number is very small compared to the number of trials conducted.

The integrity of our trial process is beyond question. Every person in Victoria should have confidence that, if he or she should face trial in this State, the trial will be conducted with absolute fairness and impartiality, and independence. The 2007 Australian Survey of Social Attitudes showed that public confidence

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1 *Winch v The Queen* (2010) 27 VR 658.
2 *DPP v Aslan* [2010] VSC 518, [21].

in the criminal courts was higher in Victoria than in any other State.[3] This is truly a cause for celebration.

I want to mention a recent example which powerfully demonstrates the truth of the proposition, that the closer you get to sentencing the better you understand it. An article in "The Age" on 3 September 2011 was headed "Why I have changed my mind about judges and lenient sentences". The author, Andrea Petrie, wrote movingly about the desire for vengeance she had felt after her brother was seriously injured in an attack by "two carloads of thugs armed with baseball bats". In her first experiences as a police reporter, she was puzzled by what she perceived to be leniency in sentencing.

But, she said, since becoming the paper's Supreme Court reporter in 2010, her views on sentencing had changed.

> *"So too has the amount of respect and understanding I have for judges who carry out one of the most emotionally and intellectually difficult tasks in society."*

As Ms Petrie correctly pointed out, the sentencing judge must always consider the nature and gravity of the crime and any aggravating factors, together with the impact of the crime on the victim(s). The prior convictions of the defendant must also be taken into account. But, as she went on to say –

> *"…mitigating circumstances relating to the perpetrator – such as age, previous good character, disadvantaged upbringing, mental health issues, history of being abused, drug or alcohol problems and previous exposure to crime – must also be taken into account. It is not just for someone with a full appreciation of the wrongfulness of their conduct to receive the same penalty as someone who is affected by these factors. Criminals are most likely criminals because of their background and circumstances, which can often reduce their moral culpability."*

Those remarks convey a strong sense of justice, and a recognition that justice has many facets.

Importantly for the purposes of this evening's forum, recent Victorian research shows that, when members of our community are likewise given a close-up view of sentencing in particular cases, they have the same strong sense of justice. In particular, they have the same appreciation of the need to take into

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[3] David Indermaur and Lynne Roberts, *Confidence in the criminal justice system*, Australian Institute of Criminology: Trends and Issues in crime and criminal justice no 387 (2009).

account those matters – "mitigating factors" – which point to a lower sentence, as well as those which point to a higher sentence.

Four real cases, involving six offenders, were presented by four County Court judges to members of the public in small groups. The study was conducted at workplaces across Melbourne and Victoria, during working hours. There was one case per group. In total, the sample comprised 471 participants – at least 115 for each case – from 32 different workplaces. This represented a balanced cross-section of workers, according to both the nature of the work (white collar/manual) and the gender of the participants.

All of the cases involved serious offending (armed robbery; multiple rapes at knifepoint; multiple stabbings; and a theft of $1m worth of goods), and each of the offenders had relevant matters to advance in mitigation of penalty.

In the judges' presentations of these cases to the participants, the facts of each offence (including the effects on the victim(s)) and the personal circumstances, behaviour and character of each offender were set out comprehensively and in detail. This information was presented as narrative and biography. The offender was portrayed as a real person, and given a name; and the participants were encouraged to treat the offender as someone whose future lay in their hands. As part of this, the judges considered in general terms the relevance of sentencing principles in the context of each case, and information was given on current sentencing practice. This took about 45-55 minutes for each case.

Once each of the participants had written down their sentence(s) for the case, the judge announced the actual sentence(s). Then, the participants were invited to comment on and discuss in their group the judge's sentence.

The results were startling. In his recently published article,[4] the author, Dr Austin Lovegrove of Melbourne University's Department of Criminology, described the results in these terms:

> *The results of the present study suggest that the judiciary are not more lenient than the balance of the public's sense of justice; in fact, here the judiciary generally were found to be harsher. In this respect, the current trend to harsher sentencing by way of less personal mitigation appears seriously misplaced. Patently, though, this is not the perception of the general public, whose dissatisfaction remains. One reason for this is that many people are not fully aware of their sense of justice, and are content to evaluate sentencing by means of the media. The fact is, as the present study shows, when people are given detailed*

[4] A Lovegrove, "Putting the offender back into sentencing: An empirical study of the public's understanding of personal mitigation" (2011) 11 *Criminology and Criminal Justice* 37.

> *information about offenders and their offending, are encouraged to feel responsibility for real people, realise their responses require thought and some general knowledge about sentencing, then many will find personal mitigation to be an important element of punishment, even in some serious cases. There are the instinctively harsh but, as the present study reveals, theirs is not the balance of opinion. There must be attempts to bring these understandings to public consciousness.*

This is the untold story. And it should be told. If the debate on sentencing is to proceed on an informed basis, it must be told.

Our community needs to know that their fellow citizens, in workplaces across Victoria, "imposed sentence" in cases of serious offending much as judges would do in the same circumstances.

To participants in the sentencing debate, I say this: keep an open mind. It's possible, just possible, that sentencing judges are more in tune with what the community really thinks than they are sometimes given credit for.

Ultimately, though, we must continue to work with the media to ensure that the public have the necessary information to make informed assessments of sentencing decisions. As the Chief Justice and Redlich JA said last year, in an important judgment dealing with these issues:[5]

> *"The Sentencing Advisory Council concluded that, were the public to form opinions from adequate court-based information instead of through the lens of the mass media, there would be better community knowledge and fewer instances of misinformed calls for harsher punishment.*[6] *We accept that proposition. However, the courts must assist the media in the task of accurately informing the public about their sentencing work. The courts and the media share the important burden of providing the public with sufficient detail of the actual sentences being imposed for all types of crime, in those cases that presently receive little or no public attention. It is in the more common areas of offending that deterrence assumes particular importance. The courts need to provide sentencing information to the media in a form that can be readily communicated to the community and on court websites.*"

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5 *W C B v The Queen* [2010] VSCA 230, [27].

6 K Gelb, 'More Myths and Misconceptions', (Research Paper, Sentencing Advisory Council 2008).